Makro, Inc. and Renaissance Properties Co., d/b/a Loehmann's Plaza *and* United Food and Commercial Workers Union Local No. 880, AFL–CIO–CLC. Case 8–CA–21058

January 25, 1995

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS, BROWNING, COHEN, AND TRUESDALE

This proceeding raises the questions of whether the Respondents have violated Section 8(a)(1) of the Act by (1) restricting the Union's access to their property by making oral demands that the Union move its pickets and handbillers; and (2) filing and pursuing a lawsuit seeking injunctive relief in state court about the number and location of the pickets and handbillers. Applying the analysis of nonemployee access issues set forth in *Jean Country*, 291 NLRB 11 (1988), the National Labor Relations Board found that the respondent acted unlawfully in restricting access to respondent's property. The Board also found that respondent unlawfully maintained a lawsuit for injunctive relief.[1] While the case was pending before the Sixth Circuit, the Supreme Court issued its decision in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), holding that the Board's balancing test in *Jean Country*, supra, as applied to nonemployee union organizers, was inconsistent with controlling Court precedent. On January 31, 1992, the Board filed a motion to remand this case for the Board's reconsideration in light of *Lechmere, supra.* On March 6, the Sixth Circuit, on consideration of the stipulation of the parties, dismissed the petition for review and cross-application for enforcement.[2]

The Board has reconsidered its decision and the record in light of the statements of position and the briefs of amici curiae and has decided to affirm its earlier decision only to the extent consistent with this Supplemental Decision and Order. For the reasons fully set forth in *Leslie Homes*, 316 NLRB 123 (1995), we hold that *Babcock & Wilcox*, 351 U.S. 105 (1956), as reaffirmed in *Lechmere*, supra, applies to nonemployee area standard activities. We note that our colleagues' dissent largely addresses the analysis of *Lechmere* in *Leslie Homes*, supra, issued together with this decision. We, accordingly, have restricted our response in this decision to those particulars of the dissent specific to this case. Under *Babcock* and *Lechmere*, a nonemployee union organizer cannot ordinarily gain access to an employer's property for the purpose of organizing the employer's employees. The organizer can gain access only in the exceptional circumstance where the employees are reasonably accessible only through trespassory means. Applying that approach to the instant case, the General Counsel has failed to prove that the intended audience of the Union's handbilling and picketing, viz, the Respondents' customers, were reasonably accessible only through trespassory means. Accordingly, the Union was not entitled to access. We need not, and do not, reach the issue of whether access would be required if the customer targets of the handbilling and picketing *were* reasonably accessible only through trespassory means. In view of our findings on the access issue, we find that the Respondents were privileged to demand that the pickets change locations, and we find that the Respondents did not unlawfully maintain a lawsuit against the Union.

I. THE ACCESS ISSUE

A. *Facts*

The Respondent, Makro, Inc. (Makro), operates a retail store, selling both grocery and nongrocery items, in Willoughby Hills, Ohio. The Respondent, Renaissance Properties Co., d/b/a Loehmann's Plaza (Renaissance), owns the strip shopping mall, Loehmann's Plaza Shopping Center (Loehmann's Plaza), where the Makro store is located. Makro leases the store property from Renaissance.

The Makro store is situated in the northeast corner of Loehmann's Plaza and is the largest store in the shopping center.[3] There are four entrances to the shopping center: three off Chardon Road (Route 6) the southern boundary of the shopping center, and one off Bishop Road (Route 84), a road that runs parallel to a service road that runs along the eastern boundary of the shopping center. (The entrance from Bishop is through the use of a driveway running from Bishop Road next to another shopping area and ending at an entrance on the east side of the shopping center.)

There are 19 smaller establishments that occupy an L-shape to the west of Makro. On the south side of the plaza, which is bounded by Chardon Road, there are other establishments (Burger King and Friendly) that are not part of Loehmann's Plaza. A large parking lot,

[1] *Loehmann's Plaza I*, 305 NLRB 663 (1991).

[2] By letter dated May 15, 1992, the Board notified the parties in this proceeding that it was reconsidering its decision in this proceeding and that statements of position could be filed regarding the issues raised by the reconsideration.

On July 17, 1992, the General Counsel filed a statement of position. On July 20, 1992, the Respondents and the Charging Party Union each filed a statement of position. On August 17, 1992, the American Federation of Labor and Congress of Industrial Organizations filed an amicus curiae brief in support of the Charging Party Union, and on September 21, 1992, the National Retail Federation filed an amicus curiae brief in support of the Respondents. On December 7, 1992, the Council on Labor Law Equality also filed an amicus curie brief in support of the Respondents.

[3] A brief description of the layout of the shopping center is set forth below and more fully in the administrative law judge's decision.

composed of primary and secondary parking areas, faces the 20 Loehmann's Plaza stores. The primary (but smaller) parking area faces Makro. The larger secondary parking area faces the other 19 stores. The driveway in front of Makro leads into it. The service road that runs along the eastern side boundary of the plaza is next to the primary parking area and connects Chardon Road with the driveway in front of Makro.

Of the three entrances to the Plaza from Chardon Road, the closest is approximately .25 mile from Makro, directly south of Makro's eastern side, and provides access to Burger King and Friendly. This entrance and the western most entrance which is approximately .4 mile from Makro, both have traffic lights. A center entrance on Chardon Road approximately .3 mile from Makro does not. The speed limit on Chardon Road is 35 miles per hour.

Parallel to the service road connecting Chardon Road to the driveway in front of Makro is Bishop Road, running north and south. This road has a speed limit of 35 miles per hour. As noted above, there is a driveway off Bishop Road, located directly east of Makro, which leads to Makro and Loehmann's Plaza. Bishop Road is about 530 feet from Makro. Two stores, Reni and Hills (formerly Golden Circle), are located on the driveway between the Bishop Road entrance and Makro.

On May 4, 1988, Makro opened its new store at its Loehmann's Plaza location. That same day, at 7 a.m., the Union placed 12 pickets at the store: 2 at each of the 2 entrances and 2 at each of the 4 exits. The pickets carried signs that read: ''UFCW Local 88. . . . Holding the line. . . . Don't shop. . . . [Ghostbuster symbol across 'Makro']. . . . Non-union. . . . For the American standard of living.'' The pickets at the store exits also passed out leaflets explaining in more detail the Union's position that wages and benefits provided under the Union's contracts might be jeopardized by Makro, whose employees were not covered by union contracts.

According to the undisputed testimony of union organizer, Patricia Baizel, the handbillers and picketers at Loehmann's Plaza were either (1) representatives of the Union; (2) ''volunteer pickets from our stores,'' i.e., union members who worked at other stores but not at Makro; and (3) paid pickets who were ''family friends of members or ourselves or high school students, or unemployed people in the neighborhood.''

Makro's general manager, Fike, and Attorney Lardakis told the union representatives to move the pickets ''from the premises'' because it was private property. In the state court proceedings, the parties stipulated that both Respondents ''asked Local 800 representatives to leave the doorways and to stand at designated areas at the parking lot entrances (on Makro property) on May 4, 1988, and on several occasions thereafter. Union Organizer Baizel also testified that on May 4, the Makro officials directed the union pickets to move ''to the grassy knolled area'' which she understood was part of the Loehmann's Plaza/Makro property. The three entrances to the shopping center off Chardon Road have grassy areas next to them. The Union refused to move, except briefly while a ribbon cutting ceremony was held.

On May 25, 1988, Renaissance's general partner, Robert Stark, and Makro's two above-named officials again asked the Union to leave their private property. Stark told the pickets to go to the center and western entrances off Chardon Road. The Makro officials told the Union to place its pickets at the two entrances closest to Makro. (The closest entrances were the eastern and center entrances off Chardon Road.) The Union again refused. The Respondents filed for injunctive relief in state court on June 6, 1988.

The Union continued the picketing and handbilling until restrained by a temporary order of the Court of Common Pleas, Lake County, Ohio, on June 29, 1988. This order limited the Union to four pickets no closer than 25 feet from Makro's entrance doors. However, this would have placed the pickets in the middle of the driveway in front of Makro. Therefore, the injunction effectively placed the pickets 50 feet from the store on the traffic islands dividing the primary parking lot from the driveway in front of Makro.

In their state court complaint, the Respondents sought, inter alia, to enjoin the Union from ''picketing with more than two (2) individuals at the two (2) entrances to or exits from Loehmann's Plaza parking lot located closest to the Makro store.'' On September 16, 1988, the court entered a permanent injunction.[4] The injunction restrained the Union

> from placing more than four (4) pickets on picket duty in front of the plaintiff store and no more than two (2) at the entrance to the parking lot at Route 6 . . . [and] that the pickets shall station themselves in the parking lots south of the front of the store, and may not approach closer to the front of the building than twenty-five (25) feet.

Pursuant to the injunction, the Union placed its pickets on traffic islands in front of Makro. The Union usually used the unpaved traffic island directly in front of the entrance of the store, although it would occasionally use the other islands.

In addition, the Union attempted to picket at all the entrances on Chardon Road. Even prior to the injunction, when the Union had extra pickets, it placed them at the eastern and center entrances. After the injunction, it continued to place pickets at the east entrance of Chardon Road, on the Burger King side of the

[4] On December 26, 1989, the Ohio Court of Appeals affirmed the judgment of the trial court.

driveway entrance. However, when the Burger King manager complained, the Union moved its pickets across the driveway. At that location, there were signs advertising Reni and Golden Circle. Reni's manager then advised the Union that his customers were complaining about the signs and asked why Reni was being picketed (as the local Reni was organized by the Union). The Union stopped picketing there.

The Union also attempted to picket and pass out handbills from the center entrance off Chardon Road.[5] According to Baizel, in a 1-week effort at handbilling ''no one . . . took a handbill.''[6] Baizel further explained that handbilling was difficult here because of the speed of the automobiles, the fact that the windows of the automobiles were closed, and the pickets were on the opposite side from the driver. As noted above, there is no traffic light at this entrance, and, as Baizel testified without contradiction, Chardon is a ''very busy road.'' As for the western most entrance to the shopping center off Chardon Road, Baizel described it as the ''least entered.''

According to the testimony of Baizel, the picketing at all three locations off Chardon Road was not effective. As she explained, ''[y]ou cannot read the wording on the sign approaching either of those exits on that driveway or from State Route 6 (Chardon Road). You cannot read them and clearly understand unless you are practically on top. So the only people that are able to read them would be the people that are stopped for the light.''

B. *Analysis*

Applying the balancing test of *Jean Country*, supra, between the property right of the Respondents and the Section 7 rights of the employees, in our underlying decision, we found that ''the Section 7 right outweighed the Respondents' right to restrict access to their private property in this particular context, and the Union was entitled to engage in picketing and handbilling that it conducted at the entrances and exits of Makro's store.''[7] In *Lechmere*, supra, the Court held that *Jean Country*, supra, impermissibly recast as a ''multi-factor balancing test'' the general rule of *Babcock & Wilcox*, supra, permitting an employer to prohibit nonemployee distribution of union organizational literature on its property. Id., 502 U.S. at 537. *Babcock*'s holding as reaffirmed in *Lechmere* is that Section 7 does not protect the trespassory activities of nonemployee union organizers except in the rare case where ''the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels.'' Id. Thus, ''it is *only* where such access is infeasible that it becomes necessary and proper to take the accommodation inquiry to a second level, balancing the employees' and employers' right.'' Id. at 538. (Emphasis in original.)

C. *Contentions of the Parties*

The Respondents and amici National Retail Federation and Council on Labor Law Equality contend that the Court's interpretation in *Lechmere* of *Babcock* applies to nonemployees who are seeking access to the Respondents' private property to engage in area standards handbilling. They contend that the General Counsel has failed to prove a lack of reasonable alternative means.

The General Counsel now moves for the dismissal of the allegations in the complaint. He contends that, applying the standard of *Lechmere*, the union representatives here did not have the right to picket or handbill the Respondents' property because the Union had reasonable alternative means to communicate its message.

The Charging Party Union and amicus AFL–CIO argue that the *Babcock/Lechmere* analysis involved organizational activity and should not apply to protected area standards activity. They contend that more liberal access principles should govern where, as here, a union is acting on behalf of employees whom it already represents. Along this same line, the Charging Party further argues that *Lechmere* is inapposite because this case involves informational picketing advising consumers that Respondent Makro is nonunion and urging a consumer boycott. Thus, the Charging Party argues that this picketing is explicitly authorized under the publicity proviso of Section 8(b)(7)(C). Further, the Charging Party and amicus AFL–CIO argue, even if the *Babcock/Lechmere* analysis does apply, the Respondent violated the Act because the Charging Party Union had no reasonable alternatives to communicating with the Respondent's customers at the Respondent Makro's storefront entrances.

The Charging Party further contends that *Lechmere* does not apply to the present case because, unlike in that case, neither Respondent maintains a sufficient property interest in the property involved to maintain a trespass action. The Charging Party also now requests the Board to remand the case to the judge to take additional evidence on the issue of disparate treatment.

D. *Discussion*

In *Leslie*, supra, the Board considered the impact of *Lechmere* on nonemployee area standards activity. After reviewing *Lechmere* and related Court prece-

[5] This was the only Chardon Road entrance at which the Union tried to handbill.

[6] In a later attempt to handbill in preparation for the state court hearing, one person took a handbill.

[7] *Loehmann's Plaza I*, supra at 668.

dent,[8] the Board concluded that the Court intended the *Babcock* analysis to apply in nonorganizational settings. Accordingly, the general rule is that an employer may prohibit nonemployee union agents from gaining access to its private property to engage in area standard activities, even where those union activities are on behalf of represented employees.

We now turn to the question of whether the Union has proven that it had no reasonable alternative means of communicating with Makro's customers.[9] In *Lechmere*, the Court stated that the *Babcock* exception requiring access to private property by nonemployee organizers applied only in rare situations where a union confronts ''unique obstacles'' to nontrespassory communications, as when the location of a plant and the living quarters of employees ''isolated [them] from the ordinary flow of information that characterizes our society.'' Id., 502 U.S. at 540. The Court emphasized that the union's burden of proving the exception is a heavy one, which cannot be satisfied ''by mere conjecture or the expression of doubts concerning the effectiveness of nontrespassory means of communication.'' Id. at 540.

Picketing and Handbilling

In our initial consideration of this case, we took into account the relative strength of the Section 7 rights and property rights, as well as the question of accessibility of the customers through nontrespassory means. On reconsideration in light of *Lechmere*, we ask whether the facts here present the rare situation when a union can reach its intended audience only through trespassory means.

Applying this *Lechmere* test, we reverse our earlier finding and conclude that the General Counsel has failed to prove that the Union was unable to communicate with Respondent Makro's customers at the locations where the Respondents permitted the Union to picket[10] and handbill.

On May 4, 1988, when the handbilling and picketing commenced at the entrances and exits of Respondent Makro's store, Makro's officials told the Union to move the pickets ''from the premises'' because it was ''private property.'' However, as noted above, the Respondents and the Charging Party stipulated in the state court proceedings that on May 4 both Respondents requested the Union to move its pickets to the parking lot entrances, which are on private property.

On May 25, these same Respondent Makro officers and the Respondent Renaissance's general partner, Robert Stark, repeated the request that the Union move its pickets. Stark told the pickets to go to the center and western entrances off Chardon Road. The Makro officials told the Union to place its pickets at the two entrances closest to Makro. Although these Makro officials did not clarify what specific entrances they had in mind, the record reflects that the eastern and center entrances off Chardon Road are the two entrances closest to Makro. In their state court complaint, the Respondents sought to enjoin picketing ''with more than two (2) individuals at the two (2) entrances to or exits from the Loehmann's Plaza parking lot located closest to the Makro store.''

As noted above, Respondent Makro requested that the pickets be located at the two entrances to the shopping center closest to Makro. In addition, since Stark mentioned the western entrance off Chardon Road, the Union picketed at all three entrances off Chardon Road without specific objection by the Respondents. It also handbilled from the center entrance off Chardon Road. It did not attempt to picket from the entrance to the shopping center off Bishop Road, Route 84. There is no evidence that the Respondents would have objected to the presence of pickets at the Bishop Road location.

The traditional factors to consider in determining whether there is a reasonable alternative to the Union's choice of picketing and handbilling are effectiveness, safety, and enmeshment of neutrals. Addressing first the effectiveness of picketing, we note that prior to the injunction, the Union placed pickets at the eastern and center entrances off Chardon Road. Thus, even in the Union's view, picketing from these entrances was perceived as having at least some effectiveness.

The Union picketed from both sides of the eastern entrance off Chardon Road. This entrance has a stop light. Concededly, according to Baizel, ''You cannot read [the picket signs] and clearly understand unless you are practically on top. So the only people that are able to read them would then be the people that are stopped for the light.'' However, the asserted fact that all people would not be able to read the picket sign is not dispositive. In *Lechmere*, 502 U.S. at 539, the Court explained that the broad proscription on trespass by nonemployee union agents will apply, even if

[8] *Hudgens v. NLRB*, 424 U.S. 507, 522 (1976); *Sears, Roebuck & Co. v. San Diego Co. District Council of Carpenters*, 426 U.S. 180, 206 (1978).

[9] As in *Leslie*, we assume, without deciding, that the *Lechmere* analysis affords the possibility of an exception permitting access to private property for area standards activity if a union can prove that an employer's customers are not reasonably accessible by nontrespassory methods. Compare *Sears*, supra at 206 (''Even on the assumption that picketing to enforce area standards is entitled to the same deference in the *Babcock* accommodation analysis as organizational solicitation, it would be unprotected in most instances.'') but cf. *John Ascuaga's Nugget, Inc. v. NLRB*, 968 F.2d 991, 998, (9th Cir. 1992) (inaccessibility exception to the rule that an employer need not accommodate nonemployee organizers does not apply to attempts to communicate with the general public).

For a complete discussion of Member Cohen's position on the application of *Lechmere* to area standards activity, see *Leslie Homes*, supra at fn. 18.

[10] There is no contention here that picketing at these locations would violate Sec. 8(b)(4)(B).

nontrespassory communication is ''less-than-ideally effective.''

Here, the evidence shows that picketing at the eastern entrance off Chardon Road would have alerted at least some Makro customers, as they stopped at the light or waited to enter the shopping center. In addition, even motorists who were not stopped at the light would have to slow their speed as they turned into the entrance. Although they may not have been able to read the entire picket signs as they did so, they would at least have been aware of the fact that the Union was picketing Makro. Further, the Union could have made the writing on the signs larger and could have included more of its message by using multiple signs. Thus, although perhaps the entire message contained in the picket sign and handbill could not have been included on a readable picket sign, the Union could have included sufficient information on the sign to alert the public of the general nature of its dispute with the Respondents.[11]

The Union also picketed from the center entrance to the shopping center off Chardon Road, which does not have a traffic light. We find that the General Counsel did not show that picketing at this entrance would not be effective. Concededly, there is no stop light at this entrance. However, as discussed above, motorists would slow their speed and would be able to discern that the Union was picketing Makro and would be able to glean at least the gist of the message.

The Union notes that the pickets were on the left side of the entrance. Thus, if there were exiting cars, the entering motorist would have a blocked view of the pickets. However, the Union does not explain why, as with the eastern entrance off Chardon Road, it could not have picketed from both sides of the entrance.

The dissent contends that picketing at the Chardon Road entrances to the shopping center would not provide a reasonable alternative to trespassory activity because the customers at Makro have less exposure to the Makro store than the employees in *Lechmere* have to their workplace. We see no basis, however, for finding that unless repeated exposure is shown a union necessarily lacks alternative means for conveying its message.

Further, we disagree with the dissent's statement that ''specific record evidence demonstrates that the Union's picketing and handbilling failed to convey the Union's message to entering motorists.'' In our view, there is insufficient evidence to support that claim. Neither, in our view, does the record show that the Union was conveying its message to ''at best, a minuscule fraction of its intended audience.'' The record does not specify what percentage of the Union's intended audience the Union would be able to reach by picketing at the three entrances off of Chardon Road. However, Chardon Road is a busy road and it is reasonable to assume, in the absence of any evidence to the contrary, that a high percentage of Makro's customers enter the shopping mall through one of these three entrances, and, therefore, would have the opportunity to read the Union's picket signs.

As for the western most entrance to the shopping center off Chardon Road, the Union's representative described it as the ''least entered.'' This entrance also has a stop light. Therefore, the Union's opportunities are the same as they were for the eastern entrances. Although there are fewer customers here, it is a third entrance and thus the Union could add to the people reached at the other two locations.

From the above, we conclude that the General Counsel has failed to prove that picketing at the Chardon Road entrances to the shopping center would not have had some effectiveness in the Union's transmittal of its message to potential customers of Makro.

We also find that the Union has not established that picketing at the locations at 502 U.S. *Lechmere*, at 540–541, the Supreme Court found that the union could safely display signs from a public property grassy strip adjoining the shopping center's parking lot. The grassy strip involved in that case abutted a 4-lane highway with a 50-mile-per-hour speed limit. The picketing here is no less safe than it was in *Lechmere.*

We recognize that the process of handbilling automobiles, i.e., having motorists lower their windows, and receive the handbills, presents problems of effectiveness and safety. However, as discussed above, we believe that a picket sign can alert customers that the Union has a dispute with Makro and that the nature of the dispute concerns area standards. If the motorist wants to learn more about the dispute, so as to make an informed decision about whether to patronize Makro, he/she can park the car and walk a short distance to receive the handbill.

Finally, we find that the picketing could be conducted without enmeshment of neutral employers. We recognize that neutral employers at the eastern entrance off Chardon Road complained that their customers were confused about which store was being picketed. This problem could be solved if the Union marked its picket signs more clearly to say that the dispute was only with Makro. Thus, the picketing could have been carried out without enmeshing any neutrals.

Based on the above, we conclude that the Union had a reasonable alternative for conveying its message.[12]

[11] In *Red Food Stores*, 296 NLRB 450, 453 (1989), the Board found a similar area standards message essentially was a request not to patronize, which was readily conveyed by pickets.

[12] We deny the Charging Party's request to reopen the record. Neither the General Counsel nor the Charging Party Union in the underlying proceeding contended that the Respondents discriminatorily prohibited the Charging Party Union from handbilling and picketing at locations where they have allowed other nonunion handbilling or

Continued

Accordingly, we shall dismiss the relevant allegations of the complaint.

II. THE LAWSUIT ISSUES

The complaint further alleged that the Respondents violated Section 8(a)(1) by seeking injunctive relief, as described above, in the Court of Common Pleas, Lake County, Ohio, as to the number and location of pickets and handbillers.[13]

In *Loehmann's Plaza I*, 305 NLRB 663, 671 (1991), we held that the filing or active pursuit of a state court lawsuit seeking to enjoin protected peaceful picketing after the point of preemption—when a complaint issues concerning the same activity—tends to interfere with Section 7 rights thereby violating Section 8(a)(1) of the Act. We held that:

> [A]t the point of preemption, the special requirements of *Bill Johnson's* [461 U.S. 731 (1983),] do not apply. Rather the ''normal'' requirements of established law apply. Under settled principles, a violation of Section 8(a)(1) is established if it is shown that the employer's conduct has a tendency to interfere with a Section 7 right. [Fn. omitted.] Accordingly, *if the Board in the unfair labor practice proceeding finds that picketing or handbilling on the property in question is protected by Section 7*, and if a preempted state court lawsuit is aimed at enjoining that Section 7 activity, it is clear that the lawsuit tends to interfere [with] (indeed, it is designed to stop) the exercise of a Section 7 right. [Emphasis added. Id.]

Absent a finding that the picketing and handbilling on private property is protected, a lawsuit to enjoin that activity is not unlawful. Since we have found above that the picketing and handbilling on private property was not protected, we find that the Respondents' lawsuit to enjoin it was not unlawful. We, therefore, reverse our earlier decision and dismiss the allegation that the Respondents violated Section 8(a)(1) by their pursuit of their lawsuit seeking to enjoin the Union's picketing and handbilling after the complaint in this proceeding issued on March 30, 1989.[14]

CONCLUSIONS OF LAW

1. The Respondents, Makro, Inc. and Renaissance Properties Co., d/b/a Loehmann's Plaza, have not violated Section 8(a)(1) of the Act by restricting the Union's access to their property by making oral demands that the Union move its pickets and handbillers.

2. The Respondents, Makro, Inc. and Renaissance Properties Co., d/b/a Loehmann's Plaza, have not violated Section 8(a)(1) of the Act by filing and pursuing a lawsuit seeking injunctive relief in state court as to the number of the pickets and handbillers.

ORDER

The complaint is dismissed.

CHAIRMAN GOULD, concurring.

I join in the dismissal of the complaint in this case. See my additional comments set forth in my concurring opinion in *Leslie Homes*, 316 NLRB 123 (1995).

MEMBERS BROWNING AND TRUESDALE, dissenting.

Contrary to the majority, we would reaffirm the Board's prior holding that Respondents Makro and Loehmann's Plaza violated Section 8(a)(1) of the Act by demanding that the Union refrain from area standards picketing and handbilling near the entrances and exits to Makro's store.[1] In our view, our colleagues err in extending the access analysis of *Lechmere, Inc. v. NLRB*, 502 U.S. 502 U.S. 527 (1992), to the Union's area standards picketing and handbilling at issue here or to Section 7 activity other than organizational activity.

We believe that *Lechmere*, supra, does not apply to this case and that the Board majority has extended the reach of the Supreme Court's holding beyond the particular facts and circumstances the Court confronted, or intended to confront. Indeed, the Court's handling of the statutory issue before it is the most persuasive argument in favor of a narrower and more carefully drawn interpretation of its reach than the majority's view. Finally, by extending *Lechmere*'s implications

picketing. In fact, at the hearing, the General Counsel expressly disclaimed any such allegation of discrimination. Nor does the Charging Party offer to adduce any newly discovered or previously unavailable evidence. NLRB Rules and Regulations Sec. 102.48(d)(1); see *Washington Street Brass & Foundry*, 268 NLRB 338 fn. 1 (1983). We note that *Lechmere* did not alter the settled rule that an employer's discriminatory prohibition of picketing and handbilling is unlawful. Therefore, the Charging Party's request is untimely.

We similarly reject the Charging Party's contentions that the complaint allegations should not be dismissed because the Respondents lack property rights to maintain trespassory claims against the Union. *Lechmere* did not change the rule that a property right can be asserted only by the party who possesses the right. See *Giant Food Store*, 295 NLRB 330, 332 (1989); *Polly Drummond Thriftway*, 292 NLRB 331 (1989), enfd. mem. 882 F.2d 512 (3d Cir. 1989). Both the Charging Party and the General Counsel had the opportunity to raise these contentions in the underlying proceeding and did not do so. In fact, in its brief in support of its exceptions to the judge's decision, the General Counsel noted that the Respondents asserted a legitimate property interest. By not making these contentions in the underlying proceeding, the Charging Party has forfeited its opportunity to assert them now. We further find no merit in the Charging Party's contention that the picketing herein was informational picketing protected under the proviso to Sec. 8(b)(7)(C).

[13] The Respondents filed for injunctive relief on June 6, 1988; the instant charge was filed June 21, 1988; and the complaint issued March 30, 1989.

[14] Member Cohen does not pass on the validity of the *Bill Johnson's*, supra, aspect of *Loehmann's Plaza I*.

[1] *Loehmann's Plaza I*, 305 NLRB 663 (1991).

beyond the factual and legal questions answered by the Court through its holding and the supporting reasoning, the majority both departs from longstanding principles of judicial interpretation and makes new law based entirely on unspoken policy considerations. In our view, judicial prudence and strong policy considerations at the very core of employees' Section 7 rights support a reading of *Lechmere* that limits its holding to organizational activity.

In its original opinion in this case, the Board applied the balancing test set forth in the pre-*Lechmere* decision, *Jean Country*, 291 NLRB 11 (1988), and found that the Respondents' demand that the Union cease picketing and handbilling near Makro's store violated Section 8(a)(1). In that first decision, the Board found that the Union had no reasonable alternative means of communicating its message,[2] reasoning that the Union's audience, Makro's shoppers, was not readily identifiable and thus could not reasonably be reached away from Makro by direct personal contact, telephone, or mail. The Board also concluded that there was no likelihood that a public media campaign would reach this audience and, therefore, it would not be reasonable to leave the burden and expense of such a campaign as the Union's only recourse. The Board further held, based on a careful analysis of Makro's position relative to neutral businesses, public property, and the type of roads bordering Loehmann's Plaza, that picketing and handbilling near the shopping center's entrances were not reasonable alternatives for the Union to transmit its message but were ineffective, were possibly dangerous, and enmeshed neutral employers. In sum, the Board found that the Union had no reasonable nontrespassory means for conveying its information to Makro's customers.

The majority, applying the standard enunciated in *Lechmere*, now concludes that the General Counsel has failed to prove that the targets of the Union's informational activities, Makro shoppers, were reasonably accessible only if the Union were able to locate its pickets on Loehmann's Plaza property near the Makro store itself.

In our view, our colleagues' conclusion that the Union had a reasonable alternative for conveying its message results from their unwarranted extension of the Court's analysis in *Lechmere* to Section 7 activity other than organizing, such as the area standards picketing and handbilling at issue in this case. This extension of *Lechmere*'s principles is unwarranted for several reasons. First, in *Lechmere*, the Supreme Court explicitly limited its holding to situations involving organizing by nonemployee union representatives, and its rationale is dependent on those specific circumstances. Second, the *Lechmere* decision also depends on the legal principle that the rights of nonemployee organizers are derivative of employee rights protected by Section 7. In our view, however, the rights of nonemployee union representatives and union members who are engaged in other types of protests, are not derivative. When union representatives and members are protesting and appealing to the public, they are doing so on behalf of themselves and the employees whom they are authorized to represent. As such, they are exercising their own Section 7 rights and those of their principals, not the rights of unrelated third parties who have not yet authorized the action. In addition, the Supreme Court's focus in *Lechmere* was on the right to organize and join unions. Other types of protests, such as the area standards protest involved in this case, involve a much different kind of Section 7 right, the right to engage in concerted activity for mutual aid and protection. In exercising that right, nonemployee union organizers and members are clearly exercising rights that are personal to them, and thus the Court's emphasis on derivative rights is inapposite. Finally, the Court's analysis of reasonable alternative means of communicating with a finite and identifiable group of employees of a single employer simply does not apply when the intended audience is much broader and more geographically diffuse, as is the general public or the clientele of a particular store like the one involved in this case.

1. *Lechmere* presented the question whether an employer violated Section 8(a)(1) by denying nonemployee union organizers access to property it controlled. The Court majority in *Lechmere* found that the right of such organizers to engage in organizational handbilling in a shopping center parking lot was governed by *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956). The Court described *Babcock*'s holding as follows:

> *Babcock*'s teaching is straightforward: § 7 simply does not protect nonemployee union organizers *except* in the rare case where ''the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels.''[3]

Consequently, the majority held that, ''at least *as applied to nonemployee organizational trespassing*,''[4] the Board's access analysis set forth in *Jean Country*, supra, was erroneous because it did not strictly follow *Babcock*'s test.

Lechmere did not explicitly signal whether its holding applied beyond the organizational sphere. Its lan-

[2] Id. at 667–668. The Board also found the Union's area standards picketing and handbilling to be clearly protected under Sec. 7 of the Act and the Respondents' interest in the property not insubstantial. Id. at 666.

[3] 502 U.S. at 537, quoting *NLRB v. Babcock & Wilcox Co.*, 351 U.S. at 112 (emphasis in original).

[4] 112 502 U.S. at 536 (emphasis added).

guage and logic, however, show that its holding is limited to ''nonemployee organizational trespassing.''[5] *Lechmere* by its terms addressed the access rights of *nonemployee union organizers*—that is, nonemployee union representatives seeking to persuade unorganized employees to support their union through personal contact with them at their workplace. The Court is notably silent as to any other class of union agent and any other type of representational activities. *Lechmere*'s analysis repeatedly refers to ''nonemployee organizers'' or ''nonemployee union organizers.''[6] The decision's few references simply to ''nonemployees'' are, in context, clearly a shorthand for nonemployee organizers.

More importantly, the Court's reasoning in *Lechmere* unravels if its holding is extended beyond nonemployee organizational activity. *Lechmere*'s rationale is grounded exclusively on the premise that Section 7 grants employees the right to ''*self*-organization'' but does not grant *nonemployees* the right to organize employees. *Lechmere* begins its analysis by quoting what it deems the ''relevant part''[7] of Section 7, the passage stating that ''[e]mployees shall have the right to *self*-organization, to form, join, or assist labor organizations.''[8] The Court concludes from this language and 8(a)(1)'s prohibition on interference with employees' exercise of Section 7 rights that ''the NLRA confers rights only on *employees*, not on unions or their nonemployee organizers.''[9] The Court reasoned further that, while *Babcock* restricted an employer's right to exclude nonemployee union organizers under certain circumstances, *Babcock* did so not because the nonemployee organizers possessed a Section 7 right to organize, but because employees' ''right of self-organization depends in some measure on [their] ability . . . to learn the advantages of self-organization from others.''[10] Finding that *Babcock* determined the ''clear meaning''[11] of Section 7 with respect to nonemployee organizational trespass, the Court's majority opinion stated:

> [W]e explained [in *Babcock*] that the Board had erred by failing to make the critical distinction between the organizing activities of employees (to whom § 7 guarantees the right of self-organization) and nonemployees (to whom § 7 applies only derivatively). Thus, while ''[n]o restriction may be placed on the employees' right to discuss self-organization *among themselves*, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline,'' 351 U.S. at 113 (emphasis added) (citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 (1945)), ''no such obligation is owed nonemployee organizers,'' 351 U.S. at 113.[12]

Therefore, *Lechmere*'s conclusion that the access rights of the nonemployee union organizers there were controlled by the stringent *Babcock* standard is based solely on *Lechmere's* explicit holding that the Section 7 right of employees to *self-organization* does not apply directly to nonemployees.

2. When nonemployee union representatives enter an employer's property to engage in Section 7 activities other than organization, however, *Lechmere*'s reasoning, which limited itself to the self-organizing guarantee of Section 7, does not address their activities. Section 7 activities other than organization, such as consumer boycott, area standards activity, or support of economic or unfair labor practice strikes, are not protected by the Section 7 guarantee of the right to self-organization, but by Section 7's guarantee of a right not treated in *Lechmere*—the right of employees ''to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.''[13]

Thus, the rights of the nonemployee organizers in *Lechmere* were viewed as derivative of the Section 7 rights of the employees they were trying to organize—employees who had *not* chosen them as representatives and who may not even have desired the organizers to invoke their rights in order to communicate with them. By contrast, when nonemployee union representatives engage in typical *nonorganizational* Section 7 activities—activities protected under the ''mutual aid and protection'' language of Section 7—their rights are *not* derivative of those of the audience they are trying to reach. Indeed, often that audience consists of an employer's customers, who have no Section 7 rights. Rather, the rights of nonemployee union representatives engaged in nonorganizational Section 7 activities are their own rights or those that arise from their role as the agents of employees who have *already* exercised their Section 7 right to select a labor organization as their representative. Thus, the Section 7 rights of nonemployee union agents engaged in ''mutual aid and protection'' activities stand on a completely different footing under the statute than those of nonemployee union organizers.

By engaging in nonorganizational Section 7 activities, nonemployee union representatives try to gain or preserve benefits, directly or indirectly, for themselves

[5] Id.
[6] 502 U.S. at 537–541.
[7] Id. at 537.
[8] Id. (emphasis added).
[9] Id. (emphasis in original).
[10] Id. 536–537 at 532 *Babcock*, 351 U.S. at 113.
[11] Id. at 536–537.
[12] Id. at 533.
[13] Strike and picketing activities also receive protection under Sec. 13 of the Act. See *NLRB v. Teamsters Local 639 (Curtis Bros.)*, 362 U.S. 274, 281 fn. 9 (1960).

or the employees whom they represent. For example, the Board has articulated the protected nature of area standards activity, such as that at issue in this case, and the source of that protection:

> Area standards picketing is engaged in by a union to protect the employment standards it has successfully negotiated . . . from the unfair competitive advantage that would be enjoyed by an employer whose labor cost package was less than those of employers subjected to the area contract standards. Failure to protect these standards could result in an undermining of wage and benefit gains in such areas. *Therefore, in its attempt to protect the area standards, a union acts not only in its own interest, but also in the interest of employees of employers with whom it has negotiated more beneficial employment standards.*[14]

Indeed, the Supreme Court has recognized that ''the rationale for protecting area-standards picketing is that a union has a legitimate interest in protecting the wage standards of its members who are employed by competitors of the picketed employer.''[15] Thus, area standards picketing directly supports one of the other employee rights explicitly enumerated in Section 7: the right to bargain collectively. The Supreme Court similarly recognized in *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978), that the exercise of Section 7 rights legitimately encompasses matters beyond employees' own work places. The Court there stated:

> Congress knew well enough that labor's cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context. It recognized this fact by choosing, as the language of § 7 makes clear, to protect concerted activities for the somewhat broader purpose of ''mutual aid or protection'' as well as for the narrower purposes of ''self-organization'' and ''collective bargaining.''[16]

When engaging in such Section 7 ''mutual aid or protection'' activities as the authorized agents of the employees they represent, nonemployee union agents stand in the shoes of those employees as the representatives the employees have chosen to act on their behalf. Indeed, the very genesis of the NLRA was Congress' view that industrial stability and labor peace, which became the Act's underlying purposes, would be furthered by enabling employees to have their interests represented by an agent of their own choosing—usually a union. A union, of course, can act only through its agents. Consequently, the nonemployee union agents' Section 7 rights to engage in activities for the mutual aid and protection of employees they represent are not merely derivative but, rather, constitute the very rights of the employees they represent.[17] As the Board has recognized, ''Employees have a right to protect advancements they have made, and their union as their representative has a right to protect their interests.''[18]

The rights of union members who are involved in the protests are even more directly implicated. For example, in this case, several of the picketers and handbillers were union members who were compensated for their time by the Union. The record does not reveal if these union members were employed by other employers who were competitors of the target employer, Makro. If they were, then by participating in the area standards protest, they were acting together

[14] *Giant Food Markets*, 241 NLRB 727, 728 (1979) (emphasis added, footnote omitted), enf. denied on other grounds 633 F.2d 18 (6th Cir. 1980).

[15] *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 206 fn. 42 (1978).

[16] 437 U.S. at 565 (1978) (footnote omitted).

[17] See Gorman, *Union Access to Private Property: A Critical Assessment of Lechmere, Inc. v. NLRB*, 9 Hofstra Lab. L.J. 1, 23 (1991).

We respectfully disagree with Sixth Circuit's recent statement in *NLRB v. Great Scot, Inc.*, 39 F.3d 678 (1994), that nonemployee area standards picketing warrants less protection than nonemployee organizational activity. As noted above, area standards activity, whether undertaken by employees or nonemployees, furthers important employee interests and is protected by a different portion of Sec. 7 than was considered in *Lechmere.* See also *Giant Food Markets v. NLRB*, 633 F.2d 18, 23 (6th Cir. 1980) (''area standard picketing['s] . . . mere lack of longevity should make it no less protected at this juncture.'')

[18] *Giant Food Markets*, supra, 241 NLRB at 728. When serving as organizers, nonemployee union agents also act on behalf of the employees they represent and should be viewed as directly exercising their members' Sec. 7 rights. Further, as employees of the union, union representatives possess their own Sec. 7 rights. The majority in *Lechmere*, however, simply failed to consider either of these bases for concluding that nonemployee union organizers directly exercise Sec. 7 rights when trying to communicate their organizational message to other employees. See Estlund, *Labor, Property, and Sovereignty After Lechmere*, 46 Stanford L. Rev. 305, 325–330 (1994).

We cannot accept our colleagues' suggestion that, in failing to consider access rights under the ''other concerted activity for the purpose of collective bargaining or other mutual aid or protection'' portion of Sec. 7, *Lechmere* implicitly rejected union agents' access under that language in all circumstances. The rights protected by that language, recognized by the Court in *Eastex*, supra, are too substantial for the Court to have totally dismissed them in the access context without analysis or even acknowledgment. Had the Court given consideration to that portion of Sec. 7 in *Lechmere*, it no doubt would have so stated. The *Lechmere* Court's focus solely on the portion of Sec. 7 granting employees the ''right to self-organization, to form, join, or assist labor organizations'' reflected that passage's obvious relevance, previously recognized in *Babcock*, supra, as the cornerstone of access rights for the purpose of engaging in *organizational* activities. The fact that the Court repeatedly and specifically limited its analysis and its holding to situations involving access of nonemployee *organizers* for the purpose of organizing the employer's employees supports this conclusion, and puts to rest our colleagues' suggestion that the Court meant to hold, sub silentio, that ''trespassory nonorganizing activity would *never* be protected.''

for their own mutual aid and protection, and acting together to protect their own right to bargain collectively, by protesting the erosion of the standards collectively bargained by the Union. Even if they were not, as union members, they were acting to protect these standards in the event that they did become employed in the industry. Either way, they certainly were not exercising anyone else's rights but their own by engaging in this area standards protest.

While the Supreme Court did not address access rights to engage in ''concerted activities for collective bargaining or other mutual aid and protection'' in *Lechmere*, it previously provided an access analysis encompassing such activities in *Hudgens v. NLRB*, 424 U.S. 507 (1976). In *Hudgens*, the Court ordered the Board to consider the lawfulness of the expulsion of economic strike picketers from a shopping mall under the Act, rather than under the First Amendment. In remanding, the Court declared that *Babcock* ''established the basic objective under the Act: accommodation of § 7 rights and private property rights 'with as little destruction of one as is consistent with the maintenance of the other.'''[19] *Hudgens* further stated that the ''locus of that accommodation, however, may fall at differing points along the spectrum depending on the nature and strength of the respective 7 rights and private property rights . . . .'' Id. *Hudgens* noted factors that might be relevant in striking the proper balance: the type of Section 7 activity undertaken, whether it was being carried on by employees or ''outsiders,'' and whether the private property in question was that of the employer or of a third party. Although invoking the principle of *Babcock*, *Hudgens* notably refrained from reiterating that access would be warranted only when a union lacked a reasonable alternative means of communication.

Lechmere stated that *Hudgens* did not ''intend[] to repudiate or modify *Babcock*'s holding that an employer need not accommodate *nonemployee organizers* unless the employees are otherwise inaccessible.''[20] By the same token, *Lechmere* did not purport to overrule *Hudgens.* Thus, *Lechmere* left intact *Hudgens*' ''points along the spectrum'' analysis regarding nonorganizational access.

3. A further reason for not extending the *Lechmere* rationale to nonorganizational activity is that its emphasis on the need to show the availability of reasonable alternative means of communication was grounded, in large measure, on the nature of the audience that the nonemployee organizers intended to reach in that case. In holding that the union must show that it lacks reasonable alternative means of communication before the Board could even undertake to balance its right to communicate with employees against the employer's property rights, the Court quoted the language of *Babcock*, which stated that the union must show that '''the *location of a plant and the living quarters of the employees* place the employees *beyond the reach* of reasonable union efforts to communicate with them.''' *Lechmere*, 502 U.S. U.S. at 539, quoting *Babcock*, 351 U.S. at 113 502 U.S. at 539, 76 S.Ct. at 684 (emphasis in original). The Court emphasized that ''*Babcock*'s exception was crafted precisely to protect the § 7 rights of those employees who, by virtue of their employment, are isolated from the ordinary flow of information that characterizes our society.'' Id. at 849. Manifestly, therefore, the Court's analysis is directed to the availability to nonemployee union organizers of reasonable means to reach employees who are located on an employer's premises. This is a finite and easily identifiable audience, and the considerations that apply to that audience are much different than those that apply to the much more diffuse audience that is the target of other types of union activity, such as consumer boycotts and area standards protests.[21]

The unique problems associated with an audience that is not limited to employees of an identifiable employer are well illustrated by the facts of this case. The union's situation in *Lechmere* could hardly be further removed from the Union's aims and circumstances here. In contrast to the identifiable, discrete, and relatively small audience that the union was trying to reach in *Lechmere*, here the Union sought to communicate with the much larger and more amorphous audience of potential and actual Makro shoppers, not one of whom could be identified and approached except when entering or exiting Makro's store.[22] Because the

[19] 424 U.S. at 522, quoting *Babcock*, 351 U.S. at 112.

[20] 502 U.S. 534 (emphasis added).

[21] As Professor Roger Hartley has observed, ''The result obtained in *Lechmere* . . . does not necessarily follow with respect to consumer picketing and handbilling. The legal calculus is quite different because the communication dynamics are quite different.'' Hartley, *Foreword: The Supreme Court's 1991–1992 Labor and Employment Law Term*, 8 Labor Lawyer 739, 742 (1992) (*Foreword*).

[22] Indeed, Professor Hartley articulated the communication dynamics of shopping center consumer picketing as follows:

> Potential patrons at one particular store located in a mall are not a clearly defined group. Hence, they cannot effectively be reached by means of targeted television, radio, and newspaper advertising. Nor can a union effectively gain access to this group of mall patrons by picketing public areas surrounding the mall: the Board [on remand in *Hudgens*, 230 NLRB 414 (1977),] listed several reasons, including the reality that ''impulse buying'' is the dominant consumer model at shopping centers. Patrons typically enter the mall first and then decide where to shop. [*Foreword*, 8 Labor Lawyer at 743.]

These dynamics led Professor Hartley to pose the following question:

> Absent newly uncovered data on consumer buying habits, *what principled basis is there for the Board and the courts to alter the previous view* that unions may gain access to shopping centers, and other commercial property, where it is difficult, if not impossible, to identify in advance the consumers they seek to reach?

Union did not possess the names and addresses of Makro's customers, it could not contact them by mail, telephone, or home visits. Further, Makro's customers undoubtedly shopped at Makro much less frequently than the employees in *Lechmere* entered and departed their employer's store in *Lechmere* which was, after all, their workplace. Thus, Makro's customers had much less exposure to the picketing at the shopping center entrances than did the employees in *Lechmere* and, consequently, were less likely to be cognizant of it. Moreover, in the present case specific record evidence demonstrates that the Union's picketing and handbilling at the shopping center failed to convey the Union's message to entering motorists. In sum, although the union in *Lechmere* was able to convey its message to at least 20 percent of its audience whose names and addresses the union possessed, in the present case the Union was able to convey its message to, at best, a minuscule fraction of its intended audience.[23]

In addition to these factors, the alternative of handbilling or picketing at the entrances to the shopping center was not reasonable, for other reasons that are directly related to the nature of the audience. The Union could not reasonably target that audience at those entrances without also reaching customers of other stores at the plaza, and thereby enmeshing those neutral employers in its dispute with Makro. A handbill or picket sign message that is targeted at the employees of a particular employer does not pose the same danger of enmeshing neutrals.

In short, both the limited nature of the audience (confined to shoppers at one particular store), and the fact that it cannot be readily identified and is geographically diffuse, make it much more difficult to reach, without access to the targeted employer's property, than the audience that the Supreme Court addressed in *Lechmere.* The Sixth Circuit described these circumstances well in *Giant Food Markets v. NLRB*, 633 F.2d 18 (1980):

> It may be assumed that, in general, it will be easier to communicate with a specific, discrete number of employees by means other than intrusion on private property than to communicate with potential consumers of a large retail store located on a major thoroughfare in a metropolitan area. . . .
>
> If area standards picketing is protected under section 7 of the NLRA, no matter how long the protection has existed, area standards pickets must be allowed a reasonable means of communicating with the consumers. When the consumers potentially come from a large metropolitan area and cannot be categorized as a specific group patronizing a specific type of store, expensive, extensive mass media or mailer campaigns should not be required. If reasonableness is a criterion for determining whether or not an alternative means of communication exists, the union should not be forced to incur exorbitant or even heavy expenses. A mass media campaign would also diffuse the effectiveness of the communication by being physically removed from the actual location of the store whose policies are at issue and would prevent any personal contact between the union and the intended audience. [Id. at 24–25.]

It is for these reasons, we would submit, that the Court's requirement that a strict inaccessibility test must be applied in every case where the union seeks access should be limited to the circumstances to which the Court limited it in the *Lechmere* case itself: access by union organizers to an employer's property for the purpose of organizing that employer's employees.

4. In applying *Lechmere* to the area standards picketing and handbilling at issue in this case, our colleagues rely on *Leslie Homes*, 316 NLRB 123, issued today. In *Leslie Homes*, our colleagues ''discern no reason to assume'' that *Lechmere*'s reasoning applies only in organizing cases ''given the Court's concern in *Lechmere* with protecting employers' private property rights.'' We believe our colleagues' approach to *Lechmere*'s application errs in two respects. First, *Lechmere* is a case that construes rights conferred by the National Labor Relations Act, as amended, and its concern with private property rights is peripheral to its construction of those rights protected by the Act. *Lechmere*'s reasoning proceeds from an analysis of only one of several rights guaranteed by the Act and of a discrete portion of the Act's full range, and it considers whether those elements grant certain rights to nonemployee union organizers. Although the Court in *Lechmere* did express some concern for private property rights, it was construing Section 7 rights of em-

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Foreword, 8 Labor Lawyer at 743 (emphasis added); see also Note, *Consumer Picketing after Lechmere, Inc. v. NLRB: The Phenomenon of ''Impulse Buying,''* 43 Catholic U. L. Rev. 279, 304–310 (1993).

[23] As Professor Hartley has observed, both *Lechmere* and *Babcock & Wilcox* state at some points that whether the nontrespassory means available to a union to reach the employees is ''reasonable'' is measured by the ''effectiveness'' of the resulting communication, while elsewhere their wording suggests that a union may not enter an employer's property ''other than when employees literally are beyond the union's reach due to their isolation from normal contacts.'' *Foreword*, 8 Labor Lawyer at 759. Professor Hartley concludes, however, that:

> *Lechmere* . . . did not abandon completely the notion that the effectiveness of the communication is a relevant consideration . . . . It speaks in terms of the feasibility of the union gaining physical access to those it seeks to inform but also makes plain that *access alone is not determinative: the access must be such that the resulting communication is effective.* [Id. at 759–760 (emphasis added).]

In isolating only *Lechmere*'s passages that suggest solely a physical proximity test for access, our colleagues articulate an erroneous and unwarranted standard.

ployees, and did not elaborate any aspect of property law or constitutional law regarding property. Contrary to our colleagues, then, we find that *Lechmere*'s outcome cannot be read as a broad assessment of employer property interests that applies, per se, to all types of trespassory access. Indeed, *Lechmere* specifically acknowledged that the Act imposes some limitations on an employer's enjoyment of its property interests in noting that, even on their own property, employers may not restrict employees' rights to discuss self-organization unless such a restriction is shown to be necessary to maintain production or discipline.

Further, and more troubling, the majority's approach, in our view, is an abdication of the Board's role as the protector of employee rights to organize, to bargain collectively, and to engage in concerted activity for mutual aid and protection. The Board is the only agency that is charged with protecting these rights guaranteed in Section 7 of the Act. If we are not vigilant in doing so, no other body will take up the cudgels. In any event, the Act does not charge the Board with diminishing the scope of protected activity based on a ''sense'' that the Supreme Court is ''concerned'' for employers' property rights. Especially in view of the fact that the language of the *Lechmere* decision itself specifically limits its holding to situations involving nonemployee organizers seeking access to an employer's property for the purpose of organizing that employer's employees, it is our view that we abdicate our responsibilities as protectors of Section 7 rights by expanding the rationale beyond the bounds prescribed by the Court itself.

Our colleagues additionally conclude that *Lechmere* applies in nonorganizational settings because of the Court's previous indications that *Babcock* applies in such settings. This reasoning ignores *Hudgens*' recasting of the *Babcock* test when applied in nonorganizational settings.[24] Moreover, contrary to our colleagues' view, *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978), does not advance their argument that the *Babcock* specific lack of alternative means standard applies to area standards picketing by nonemployee union representatives. *Sears*' access discussion cannot be regarded as conclusive, because *Sears* concerned a preemption issue and involved access only tangentially. *Sears assumed* for the purpose of discussion that access for area standards picketing would be accorded the same treatment as access for organizational solicitation. *Sears*' statements concerning access for area standards picketing were predicated on that assumption, which did not constitute a holding. Further, although *Sears* suggested that nonemployee access for area standards picketing warranted less protection than that for the ''core'' activity of organizational solicitation, this can no longer be regarded as authoritative. *Lechmere* teaches that the Act protects *employees'* rights to organize *themselves* but that organizational efforts by *nonemployees* are not directly protected. Thus, after *Lechmere*, organizational activity by nonemployees must be viewed as farther down the spectrum of Section 7 rights than previously thought. Consequently, contrary to our colleagues, we conclude that measuring access for area standards activity against that granted for organization by nonemployees demonstrates little, for, after *Lechmere*, it involves comparing directly protected activity with indirectly protected activity. Differences in outcome may be attributable, at least in part, to the greater difficulty in reaching the audience that area standards activities seek to address. See *Giant Food Markets v. NLRB*, supra 633 F.2d at 24 (property rights may have to yield more often to area standards picketing because focus of inquiry is intended audience). Thus, there is no warrant to import *Lechmere*'s reinterpretation of *Babcock* into the nonorganizational sphere.[25]

Our colleagues' final and most strained contention is that, by quoting *Babcock*'s general rule that ''an employer may validly post his property against nonemployee distribution of union literature,'' but omitting the clause ''if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message,''[26] *Lechmere* implied that this rule extends beyond the organizing context. Treating the Court's partial quotation of a sentence from a prior decision as silently overruling the content of the unquoted portion is not a responsible interpretation of the Court's language. This is particularly true where, as here, in the paragraph immediately preceding this quotation, *Lechmere* plainly and unequivocally characterized *Babcock*'s meaning as encompassing the content of the

[24] Because *Hudgens* makes plain that access to private property may be appropriate for activity involving a variety of Sec. 7 rights, participants, and audiences, our colleagues err in failing to squarely reject the Ninth Circuit's suggestion in *John Ascauaga's Nugget, Inc. v. NLRB*, 968 F.2d 991 (9th Cir. 1992), that, after *Lechmere*, access to private property can never be granted for the purpose of communicating with an employer's customers, regardless of whether the union lacks any reasonable nontrespassory means of reaching them.

[25] Contrary to our colleagues, we understand, in context, *Lechmere*'s statement that *Sears* laid to rest any question whether *Central Hardware*, 407 U.S. 539 (1972), and *Hudgens* changed Sec. 7 law as simply reiterating *Lechmere*'s prior statement that those cases did not ''repudiate or modify *Babcock*'s holding that an employer need not accommodate nonemployee organizers unless the employees are otherwise inaccessible.'' 502 U.S. at 534. *Central Hardware*, like *Babcock*, concerned nonemployee organizers' access to private property and, as noted above, *Sears*, a preemption case that concerned access only tangentially, also applied, for the purpose of discussion, the test applicable to access by nonemployee organizers.

[26] 502 U.S. at 538, quoting *NLRB v. Babcock & Wilcox Co.*, 351 U.S. at 112.

clause omitted in the language our colleagues cite. That prior paragraph stated:

> *Babcock*'s teaching is straightforward: § 7 simply does not protect nonemployee union organizers *except* in the rare case where ''the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels.''[27]

Thus, any notion that *Lechmere* indicated an abandonment of the language that employees must be reachable by the union through other available channels is contradicted by the very language of *Lechmere* itself.

5. Because, in our view, the *Lechmere* strict inaccessibility test simply has no application to communication by union representatives and members which has purposes other than organizing an employer's employees, we would apply an access test for these types of communications which takes into account the Supreme Court's admonition in *Babcock* that Section 7 and property rights be accommodated ''with as little destruction of one as is consistent with the maintenance of the other,''[28] as further clarified by the instruction in *Hudgens* that, in making that accommodation, the Board should keep in mind that the ''locus of that accommodation . . . may fall at differing points along the spectrum depending on the nature and strength of the respective 7 rights and private property rights.''[29] With those admonitions in mind, we would seek to determine in every case involving union protests which are directed at purposes other than organizing the employees of the employer on whose property the union is seeking access, whether the union representatives or members had reasonable alternative means of communicating their message to their intended audience. In making these determinations, we would consider the nature of the audience to whom the message is targeted and the impediments that the union faces in getting its message to that audience without the access to the property that it is seeking. In addition, we would, in every case, factor in the nature and strength of the employer's property interest versus the importance of the Section 7 right asserted by the union. This is similar to the analysis which the Board applied to union protests which were directed at either the general or the consuming public prior to its *Jean Country*[30] analysis, and prior to *Lechmere*.[31]

Applying that analysis to the facts of this case, we would reaffirm the Board's prior conclusion that the Union had no reasonable alternative means of communicating its area standards protest to its intended audience, the customers and potential customers of the Makro store. That audience was not readily identifiable and thus could not reasonably be reached away from Makro by direct personal contact, telephone, or mail. There was also little likelihood that a public media campaign would reach this audience, and therefore it would not be reasonable to leave the burden and expense of such a campaign as the Union's only recourse.

In addition, we agree with the Board's previous conclusions that picketing and handbilling near the shopping center's entrances was not a reasonable alternative for the Union, but was ineffective, was possibly dangerous, and enmeshed neutral employers. Picketing at the Chardon Road entrances was completely ineffectual, because the occupants of moving cars could not read the picket signs, which were necessarily too small to contain all the information that the Union wished to convey. Handbilling at the Chardon Road entrances was just as fruitless, because cars using Chardon Road moved quickly, and their windows were closed. The leafletters were also, by necessity, on the drivers' right, so that a driver could not take a leaflet without stopping the car, reaching across the seat, and unrolling the passenger side window—an operation that would surely interfere with the rapid flow of traffic and even endanger the Makro shopper. Additionally, as the Board previously found, picketing at the shopping center entrances was a safety hazard to both the picketers and drivers because of the speed of the entering vehicles. Furthermore, by picketing at the Chardon Road entrances, the Union faced a Hobson's choice, as it prompted complaints from neutral businesses wherever it went. When it picketed at the east entrance, the Burger King manager complained. When the pickets moved away from Burger King to the other side of the entrance, the manager of Reni, another store in the vicinity, complained that his customers were asking if Reni was being picketed, because the pickets were near one of its signs. Consequently, the Union ceased picketing at that location. As the Board previously found, picketing at the other entrances would likely result in similar enmeshment of neutral employers.

The conclusion we would reach is also supported by the nature and relative strength of the property rights asserted by Loehmann's Plaza and Makro. Their parking lot is open to the public, and the public routinely uses it for shopping purposes. Although it is true that the fact that the public is invited on their property does not give members of the public the right to use it in any way they see fit, this fact does serve to distinguish this case from those involving company premises that are not open to the public, and it blunts the Respondents' argument that they need to restrict access. Espe-

[27] Id. Emphasis in original.

[28] *Babcock*, 351 U.S. at 112.

[29] *Hudgens*, 424 U.S. at 522.

[30] 291 NLRB 11 (1988).

[31] See, for example, *Montgomery Ward*, 265 NLRB 60 (1982); *Seattle-First National Bank*, 243 NLRB 898 (1979), enfd. 651 F.2d 1272 (9th Cir. 1980); *Giant Food Markets*, 241 NLRB 727 (1979), enf. denied 633 F.2d 18 (6th Cir. 1980).

cially in view of the fact that there is no allegation or evidence of violence or interference with ingress or egress at Makro or any other stores, the fact that the public is invited onto the property significantly diminishes the strength of the Respondents' asserted property rights in this case. See *Giant Food Markets*, supra.

In considering the nature and strength of the Union's asserted interest, we would not here attempt to ''rank'' Section 7 rights in terms of importance. Suffice it to say that the interest of the Union and its members in publicizing its assertion that Makro was undercutting negotiated area standards is a right that is clearly protected by Section 7 of the Act,[32] and, in our view, plainly outweighs the diminished private property interest of Loehmann's Plaza and Makro. In view of the lack of any reasonable alternative means available to the Union and its members to publicize their dispute, we agree with the Board's previous conclusion that the Respondents' demand that the Union cease picketing and handbilling near Makro's store violated Section 8(a)(1) of the Act.[33]

In summary, because we believe that our colleagues err in applying the holding and analysis in *Lechmere* to nonorganizational activity, and further err in dismissing the complaint in this case, we respectfully dissent.[34]

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[32] See, e.g., *Giant Food Markets*, supra at 728, citing *Houston Building Trades Council (Claude Everett Construction)*, 136 NLRB 321 (1962).

[33] Decisions of the circuit courts that have addressed this issue since *Lechmere* do not, in our view, provide persuasive authority that the *Lechmere* strict inaccessibility approach should be applied outside the nonorganizational sphere. In our view, *Davis Supermarkets v. NLRB*, 2 F.3d 1162 (D.C. Cir. 1993), and *John Ascauaga's Nugget, Inc. v. NLRB*, 968 F.2d 991 (9th Cir. 1992), were decided based on an overly expansive reading of the *Lechmere* Court's statement that the Act ''confers rights only on *employees*, not on unions or their nonemployee organizers.'' *Lechmere*, 502 U.S. at 532. In addition, in *Davis Supermarkets*, the D.C. Circuit upheld the Board's finding of a violation, albeit based on the alternative rationale that some of the picketers denied access were employees. In *Oakwood Hospital v. NLRB*, 983 F.2d 698 (6th Cir. 1993), a divided panel denied enforcement of the Board's holding that the hospital's exclusion of a nonemployee union organizer from its cafeteria violated the Act. The Sixth Circuit disagreed with the Board that the hospital's treatment of the organizer was discriminatory because the cafeteria was open to the public. Regardless of the merits of the court's conclusion that this was not discriminatory treatment, that case, like *Lechmere* itself, clearly involved the access rights of a nonemployee union organizer, and thus does not implicate the issues raised in this case.

[34] Member Browning would also find that the Respondents' pursuit of a state court lawsuit to enjoin the Union's picketing and handbilling violated Sec. 8(a)(1) of the Act. Member Browning agrees with the view Justice Blackmun set forth in his concurring opinion in *Sears, Roebuck & Co. v. San Diego County District of Carpenters*, 436 U.S. 180 (1978), that state court jurisdiction is preempted once the union files an unfair labor practice charge. In the absence of a Board majority for that position, however, Member Browning would apply the *Loehmann's Plaza I* rule that the General Counsel's complaint triggers preemption. See *Riesbeck Food Markets*, 315 NLRB 940 fn. 14 (1994).